Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-934

RICHARD LAWRENCE AND NICHOLAS BARNES,
Appellants,

VS.

BOARD OF EDUCATION OF THE CITY OF CHICAGO AND THE CITY OF CHICAGO,
Appellees.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

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Appellants Richard Lawrence and Nicholas Barnes respectfully submit this brief opposing the motions to dismiss or affirm filed herein by the Board of Education of the City of Chicago [hereinafter "Board"] and the City of Chicago [hereinafter "City"].

THE FEDERAL QUESTIONS PRESENTED IN THIS APPEAL WERE RAISED BELOW

In its motion to dismiss or affirm, the Board contends that: "no federal constitutional or statutory issue was presented for review to the Appellate Court of Illinois and as a result no federal issue was mentioned, discussed or passed upon by the

Appellate Court of Illinois", and that "no federal question was presented for review to the Supreme Court of Illinois in the appellants' petition for leave to appeal". (Board Motion, 8.)

The issue whether a federal question has properly been raised and preserved, while "itself ultimately a federal question. . .", is determined by reference to the practice of the state from whose courts the appeal is taken. *Street* v. *New York*, 394 U. S. 576, 583-84 (1969). Under Illinois Supreme Court Rule 341 (58 Ill. 2d Rule 341):

> ". . . it is not now required that the Points and Authorities consist of the propositions relied upon in support of the appeal, nor does this rule limit the Argument to points made in the Points and Authorities . . . . Thus, under the present rule it is the *content* of the Argument in the appellant's brief which determines the propositions relied upon in support of the appeal". *Collins* v. *Westlake Community Hospital*, 57 Ill. 2d 388, 391-92; 312 N. E. 2d 614, 616 (1974) (emphasis added).

The Board does not contend that the federal questions presented to this Court were not argued in the Illinois Appellate and Supreme Courts, or that they are not supported by the Record on Appeal, and in fact the arguments were extensively presented to those courts. (Jurisdictional Statement, 10-11.) Appellants have fully preserved the federal questions at all stages of the litigation under Illinois law.

While Illinois Supreme Court Rule 341 is thus dispositive of the preservation question raised by the Board, it should also be noted that the "Points and Authorities," "Issues Presented For Review" and "Points For Reversal" sections of appellants' briefs and petitions in the state appellate courts asserted the existence and violation of a fiduciary duty toward the Midway land. From the outset of the litigation, appellants have asserted that the trust duty arises out of federal law. (Jurisdictional Statement, 7.) The Board has consistently admitted that it holds the Midway Airport Property in trust for the use of schools. (Answer to [Second] Amended Complaint, ¶ 12.)

Finally, the Board's contention that no federal issue was mentioned, discussed or passed upon by the Appellate Court of Illinois is simply untrue. The Appellate Court clearly acknowledged that appellants' argument that the Board had breached its trust duty of undivided loyalty was founded upon this Court's decision in *Lassen* v. *Arizona ex rel. Arizona Highway Department*, 385 U. S. 458 (1967) and upon the decision in *United States* v. *78.61 Acres of Land*, 265 F. Supp. 564 (D. Neb. 1967) (Jurisdictional Statement, A7), and thus recognized the federal law underpinnings of appellants' breach of trust arguments. The Appellate Court's failure to decide the questions raised when it should have done so does not impair appellants' standing in this Court.

THE ISSUES PRESENTED IN THIS APPEAL ARE QUESTIONS OF FEDERAL LAW AND NOT OF FACT

In attempting to bolster their arguments that this case does not present a substantial federal question, the Board and the City make several serious misstatements of fact that appellants cannot leave uncorrected. Both suggest that there was no loss in rentals to the Board as a consequence of its conduct; this is directly refuted by the opinion of the court below, which held that such diminution of rentals was "clear". (Jurisdictional Statement, A8-9.) The Board now claims that it "studied, discussed and carefully considered all available facts". (Board Motion, 2.) Some of the numerous facts disregarded by the Board are more fully set forth in the Jurisdictional Statement at pp. 8-10. If the Board is now professing possession of and reliance on these facts, its breach of trust is all the more clear.

The appellees' conduct is well evidenced in the record below; at issue here is the legal standard by which their acts must be measured. The court below held these acts not to be arbitrary or corrupt. Appellants contend that neither that standard nor the concept of "plenary and exclusive" state sovereignty over

school land which the Board now urges for the first time in this long litigation (Board Motion, 4), govern the acts of a public fiduciary of federal grant lands.

For the foregoing reasons, appellants respectfully urge that appellees' motions to dismiss or affirm be denied, and submit that the questions presented by this appeal are substantial and of public importance.

Respectfully submitted,

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